STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 4, 2001
V GARY ALAN KATZ, Defendant-Appellant.	No. 224477 Livingston Circuit Court LC No. 99-011039-FH

Before: Hood, P.J., and Whitbeck, and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his conviction following a bench trial of the unlawful manufacture of at least five kilograms but less than forty-five kilograms of marijuana, MCL 333.7401(2)(d)(ii). The trial court sentenced him to one to seven years' imprisonment. We affirm.

Defendant's sole issue on appeal relates to a search warrant obtained for one of his several properties: 5248 Vines Road in Marion Township. Defendant contends that this search warrant was not supported by probable cause and that any evidence obtained during the search could not be used either at trial or to support additional search warrants.[1]

Defendant first contends that any observations the police made during two warrantless encroachments[2] on the Vines Road property could not be considered in the probable cause determination, because the warrantless encroachments violated his Fourth Amendment rights. We decline to review this argument because defendant lacks standing to raise it. To have standing to bring an appeal, a party must be aggrieved by the lower court's decision. *Dep't of Consumer & Industry Services v Shah*, 236 Mich App 381, 385; 600 NW2d 406 (1999). Here, defendant was not aggrieved by the trial court's treatment of this issue. Indeed, while the trial

[1] The fruits of the search at 5248 Vines Road were used to support the searches of additional properties, on which the marijuana plants forming the basis for defendant's instant conviction were found.

[2] Apparently, these encroachments consisted of a police officer coming to the door of the Vines Road residence, knocking, and making observations.

court did not definitively rule on whether the police violated defendant's constitutional rights during the two warrantless encroachments, the court, in determining whether probable cause existed to search the Vines Road property, nevertheless gave defendant the benefit of the doubt and struck from the Vines Road search warrant affidavit the observations made during the encroachments. Accordingly, for all practical purposes, the court ruled for defendant on this issue, and defendant therefore has no standing to raise the issue once again on appeal. *Id*.

Defendant next contends that the search warrant affidavit failed to establish probable cause to search the Vines Road property and that the court therefore should have granted his motion to suppress. In reviewing this issue, we must give substantial deference to the magistrate who originally examined the affidavit and issued the search warrant. *People v Whitfield*, 461 Mich 441, 446; 607 NW2d 61 (2000). Keeping in mind the "totality of the circumstances," see *People v Russo*, 439 Mich 584, 605; 487 NW2d 698 (1992), we must examine the affidavit in a commonsense and realistic manner and determine whether a reasonably cautious person could have concluded that the magistrate's determination of probable cause had a "substantial basis." *Whitfield, supra* at 446.

Here, even disregarding the observations made by the police during the warrantless encroachments on the Vines Road property, the facts set forth in the search warrant affidavit provided a "substantial basis" for the magistrate's decision. Indeed, the redacted affidavit set forth, *inter alia*, the following information: (1) an anonymous informant stated that the Vines Road residence was unoccupied, that no trash was placed at the curb of the property on trash days, that a male individual visited the residence sporadically, and that the land contract payments for the property were made twice monthly, using cashier's checks from different locations; (2) the affiant independently verified that the land contract payments for the property occurred with money orders, that the residence appeared unoccupied, and that no trash was placed at the curb of the property on trash days; (3) the affiant learned from a Detroit Edison employee that the power usage for the Vines Road residence was above average for residential home usage; (4) surveillance using night vision binoculars revealed an "intense bright light coming from what appear to be cracks in the coverings on the windows"; (5) radar surveillance of the house revealed "an extensive heat source emanating from the basement"; (6) a canister containing suspected cocaine was found in the trash at another residence jointly owned by an owner of the Vines Road residence; (7) the owners of the Vines Road property owned two additional properties; (8) the affiant was trained in the identification of indoor marijuana growing operations and had investigated several such operations; and (9) in the affiant's opinion, persons involved in marijuana grow operations often purchase properties under land contracts, pay debts with cash, cover the windows of the involved residence, do not leave trash at the curb of the involved residence, use lamps that produce bright lights and consume significant energy, visit their growing sites sporadically to tend the plants, and conduct their growing operations at multiple locations.

This information, viewed as a whole and in a commonsense fashion, provided a substantial basis for the magistrate to conclude that there was a fair probability of a criminal operation occurring at the Vines Road address. See *Whitfield, supra* at 446. Indeed, considering the high utility bills that occurred despite the unoccupied status of the residence, the bright light emanating from around covered windows, the absence of trash, the land contract payments made

with cashier's checks from various locations, the multiple properties, the short visits to the property, and, significantly, the affiant's training, experience, and opinions, see *id.* at 448, the magistrate properly issued the search warrant. While an innocuous explanation for the various suspicious facts might have been *possible*, there nonetheless existed a fair probability of a criminal operation. As noted in *Whitfield, id.* at 446, courts should not invalidate warrants by interpreting affidavits in a hyper technical as opposed to a commonsense manner. No error occurred with respect to the trial court's ruling in this case.[3]

As a final note, we acknowledge that in the recent case of *Kyllo v United States*, 533 US ___; 121 S Ct 2038; 150 L Ed 2d 94 (2001), the United States Supreme Court held that the use by police of thermal imaging scanners to detect potential marijuana growing operations was impermissible. Although the police did indeed use a thermal imaging scanner to detect the heat level emanating from the Vines Road house in the instant case, we do not find that *Kyllo* requires us to reverse. First, defendant did not challenge the use of the scanner in the trial court. Secondly, even if the reference to the scanner and the heat level were stricken from the instant search warrant affidavit, sufficient information remained to support the magistrate's finding of probable cause.[4]

Affirmed.

/s/ Harold Hood
/s/ Patrick M. Meter

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[3] Defendant relies on several out-of-state cases and one unpublished Michigan case for his argument that probable cause was lacking in the instant case. Most of these cases presented a weaker factual basis for the probable cause finding than was present here. More significantly, the cases do not constitute binding precedent on this Court.

[4] We note that contrary to the concurrence, we do not believe that it is even necessary to consider *Kyllo* with respect to the police officer's use of night vision binoculars to obtain *visual images* in this case. Indeed, *Kyllo* did not address the use by police of night vision binoculars to obtain visual images (as opposed to invisible heat levels). Such devices are sold at retail and may very well be "in general public use" such that their use by police would not be considered an illegal search by the *Kyllo* majority. See *Kyllo, supra* at 2046. What *Kyllo does* squarely apply to with respect to this case is the use by the Michigan State Police of thermal imaging technology. (As noted in the search warrant affidavit, Officer Jeffery Woods of the Howell City Police conducted the surveillance using the night vision binoculars and detected the visual "bright light coming from what appears to be cracks in the coverings on the windows." Officers from the Michigan State Police, however, used thermal imaging technology to detect the invisible heat emanating from the basement.) In our opinion, *Kyllo* has no clear applicability to the admissibility of the visible light coming from the windows in this case but only to the admissibility of the results of the thermal imaging technology. As noted *supra*, however, because defendant did not object to the use of the thermal imaging technology, and, more significantly, because the search warrant affidavit set forth sufficient information to establish probable cause even if the reference to the heat levels was stricken, *Kyllo* does not mandate reversal in this case.